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7 IN THE UNITED STATES DISTRICT COURT
8 FOR THE DISTRICT OF OREGON

9 MICHAEL JENKINS,)
10)
11) Petitioner,) Civil No. 98-590-AA
12)
13) vs.)
14)
15) DAN JOHNSON, Superintendent,) OPINION AND ORDER
16) Snake River Correctional)
17) Institution,)
18) Respondent.)
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23)

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AIKEN, Judge:

Pursuant to 28 U.S.C. § 2254, petitioner filed a petition on May 11, 1998, against defendant Dan Johnson, Superintendent of the Snake River Correctional Institution, for writ of habeas corpus. Petitioner's claims are denied and the petition is dismissed.

1 limitations, petitioner appealed the PCR trial court's decision,
2 however, the Oregon Court of Appeals affirmed without opinion,
3 Jenkins v. Maass, 113 Or. App. 233, 832 P.2d 1276 (1992),
4 petitioner did not petition the Oregon Supreme Court for review;
5 and finally, four years later, on September 4, 1996, relief was
6 denied on his fourth PCR petition again finding the petition timed
7 barred by Oregon's statute of limitations and improperly
8 successive, petitioner again alleged ineffective assistance of
9 counsel due to counsel's alleged failure to argue that the
10 juvenile court lacked jurisdiction to remand petitioner to adult
11 court. The PCR court dismissed this proceeding with prejudice.
12 Petitioner then moved unsuccessfully for permission from the
13 Oregon Court of Appeals to file an untimely appeal. Review of the
14 Oregon Court of Appeals' dismissal was denied by the Oregon
15 Supreme Court.

16 On May 11, 1998, less than one year later, petitioner's
17 federal habeas corpus petition was filed.

18 DISCUSSION

19 _____Petitioner brings this federal habeas corpus proceeding
20 challenging his jury trial convictions for Rape in the First
21 Degree (two counts), Sodomy in the First Degree, Kidnapping in the
22 First Degree, and Robbery in the Third Degree. Petitioner alleges
23 that, due to an unusual set of timing sequences, no court in
24 Oregon could have properly acquired jurisdiction over him in order
25 to resolve these offenses. Thus, petitioner argues, his federal
26 constitutional due process rights were violated by the mere fact
27 that he was prosecuted for these crimes.

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1 Respondent first asserts that petitioner's lack of
2 jurisdiction/due process claim was not fairly presented to the
3 Oregon Supreme Court as required by the exhaustion doctrine, and
4 it cannot now be fairly presented. Therefore, respondent argues
5 that petitioner's claims are procedurally defaulted.

6 Habeas petitioners are required to exhaust state remedies on
7 all claims alleged in their § 2254 petition unless it appears
8 there is an absence of available state corrective process, or
9 circumstances exist that render such process ineffective to
10 protect the petitioner's rights. 28 U.S.C. § 2254(b)(1). In
11 order to properly exhaust state remedies, "the state prisoner must
12 give the state courts an opportunity to act on his claims before
13 he presents those claims to a federal court in a habeas petition."
14 O'Sullivan v. Boerckel, 526 U.S. 838, 842 (1999). To "fairly
15 present" a federal claim in state court, habeas petitions must
16 "include reference to a specific federal constitutional guarantee,
17 as well as a statement of facts that entitle the petitioner to
18 relief." Gray v. Netherland, 518 U.S. 152, 162-63 (1996). Most
19 recently, the United States Supreme Court stated:

20 ordinarily a state prisoner does not 'fairly present'
21 a claim to a state['s] [highest] court if that court
22 must read beyond a petition or a brief (or a similar
23 document) that does not alert it to the presence
24 of a federal claim in order to find material, such
25 as a lower court opinion in the case, that does so.

26 Baldwin v. Reese, 541 U.S. 27, 32 (2004).

27 Moreover, a petitioner must have presented his federal claim to
28 the state court in a procedural context in which the claims'
merits will be considered. Castille v. Peoples, 489 U.S. 346,
351-52 (1989) (claim not fairly presented when raised for the first

1 time on petition for review to state Supreme Court).

2 The United States Supreme Court has held that:

3 [t]his court will not review a question of federal
4 law decided by a state court if the decision of that
5 court rests on a state law ground that is independent
6 of the federal question and adequate to support the
7 judgment This rule applies whether the
8 state law ground is substantive or procedural.

9 Coleman v. Thompson, 501 U.S. 722, 729 (1991) (internal citations
10 omitted).

11 Coleman also held that a state court decision rests on
12 independent and adequate state procedural grounds if a state court
13 declined to address a petitioner's federal claim because the
14 petition failed to meet a state procedural requirement. Id. at
15 729-30. In those cases, the claims are held procedurally
16 defaulted.

17 The respondent asserts that petitioner's claim that his
18 federal due process rights were violated because the adult court
19 lacked jurisdiction over him was not "fairly presented" to
20 Oregon's highest court during his direct appeal. I agree that
21 petitioner's claim as stated above could have been raised at
22 petitioner's underlying trial and on direct appeal. In fact,
23 during petitioner's various PCR proceedings as outlined above,
24 petitioner alleged that trial and appellate counsel performed
25 ineffectively by not advancing this issue during petitioner's
26 underlying criminal proceedings. Oregon courts hold that PCR
27 petitioners generally may not raise claims in PCR proceedings that
28 could have been raised during the underlying criminal proceeding
and on direct appeal, unless they assert that failure to raise the
claim constituted inadequate assistance of counsel. Palmer v.

1 State of Oregon, 318 Or. 352, 356-58, 867 P.2d 1368 (1994).

2 Here, petitioner failed to raise any due process claims in
3 his brief to the Oregon Court of Appeals. Further, he failed to
4 petition the Oregon Supreme Court for review during his direct
5 appeal proceedings. Therefore, the claim argued by petitioner in
6 the motion at bar was not "fairly presented" to Oregon's highest
7 court during his direct appeal proceedings. Petitioner is now
8 barred under Oregon law from filing any additional direct appeals,
9 and therefore cannot "fairly present" his claim to Oregon's
10 highest court in a procedural context where its merits will be
11 considered.

12 Petitioner argues that his claim is not procedurally
13 defaulted because he attempted to litigate it during his last
14 three PCR proceedings. First, I note that petitioner should have
15 presented his claim to the Oregon Supreme Court during his direct
16 appeal, not during a PCR appeal. Petitioner's claim is defaulted
17 for that reason, even assuming petitioner had presented his claim
18 to the PCR trial court in a "properly filed" PCR petition. Turner
19 v. Compoy, 827 F.2d 526, 529 (9th Cir. 1987) (if a state "mandates
20 a particular procedure to be used to the exclusion of other
21 avenues of seeking relief" the correct avenue must be fully
22 exhausted).

23 Second, petitioner's claim was not "fairly presented" to the
24 PCR courts because the PCR proceedings wherein petitioner raised
25 this claim were found improperly successive and/or time-barred.
26 Regarding petitioner's first PCR proceeding in November 1981,
27 petitioner had the information necessary to raise the claim but
28 did not do so. Even if petitioner had raised his due process

1 claim in that proceeding, that fact would not assist petitioner
2 because he failed to appeal the PCR trial court's dismissal of
3 that PCR proceeding. Therefore, no claims were "fairly presented"
4 to the Oregon Supreme Court during petitioner's first PCR
5 proceeding. Petitioner's second PCR proceeding was filed in 1986.
6 In 1988, he filed an amended PCR petition asserting the following:
7 (1) he could not have raised his lack of jurisdiction/due process
8 claim in his first PCR proceeding because the relevant information
9 was unknown to him at the time; and (2) trial and appellate
10 counsel performed ineffectively by failing to raise that claim
11 "even after being instructed to do so by petitioner." Assuming
12 petitioner did "instruct" trial and appellate counsel to raise his
13 due process claim during his underlying criminal proceedings, then
14 petitioner must have known the information relevant to his claim
15 since 1980. The facts necessary for petitioner to have raised
16 this claim are included in the Memorandum of Points and
17 Authorities that trial counsel filed during petitioner's criminal
18 proceedings. Or. Rev. Stat. 138.550(3) states that:

19 [a]ll grounds for relief claimed by petitioner in a
20 petition pursuant to ORS 138.510 to 138.680 must be
21 asserted in the original or amended petition,
22 and any grounds not so asserted are deemed waived
23 unless the court on hearing a subsequent
petition finds grounds for relief asserted
therein which could not reasonably have been raised
in the original or amended petition.

24 ORS 138.550(3) (1986).

25 This procedural matter was never addressed by the PCR court
26 because the court granted petitioner's voluntary motion to dismiss
27 his second PCR proceeding without prejudice.

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1 In petitioner's third PCR proceeding, he did not raise his
2 lack of jurisdiction claim as a federal due process claim.
3 Instead, petitioner raised that claim in the context of
4 ineffective trial and appellate counsel claims. Regardless,
5 petitioner still would not have a due process claim in the case
6 at bar because the PCR trial court dismissed petitioner's third
7 PCR proceeding as time-barred by the applicable statute of
8 limitations. Moreover, even if the PCR court were wrong in
9 dismissing petitioner's third PCR petition as time-barred,
10 petitioner's claim would still fail as he did not petition the
11 Oregon Supreme court for review after the Court of Appeals
12 affirmed the PCR trial court's decision. Again, I find that
13 petitioner's claims were not "fairly presented" to the Oregon
14 Supreme Court in petitioner's third PCR proceeding.

15 After the Appellate Judgment issued in 1992 from petitioner's
16 third PCR proceeding, petitioner did nothing for four years before
17 finally filing his fourth PCR proceeding. In this proceeding,
18 petitioner again failed to raise his lack of jurisdiction claim
19 as a due process claim. Instead, he referred again to the
20 jurisdiction issue only as a basis for ineffective trial and
21 appellate counsel claims. The PCR court granted respondent's
22 motion to dismiss petitioner's fourth PCR proceeding on the
23 grounds that it was both successive and time-barred under Oregon
24 law. Petitioner failed to appeal the dismissal of his fourth PCR
25 proceeding in a timely manner. In his petition for review before
26 the Oregon Supreme Court, he neglected to mention the claim at
27 bar. Instead, petitioner's argument addressed whether he should
28 have been allowed to file an untimely PCR appeal. Therefore,

1 petitioner's lack of jurisdiction/due process claim was not
2 "fairly presented" to the Oregon Supreme Court during his fourth
3 PCR proceeding because that proceeding was found to be time-barred
4 and improperly successive. See Coleman, 501 U.S. at 749 (by
5 filing late, petitioner defaulted his entire state collateral
6 appeal); O'Sullivan, 526 U.S. at 484 (failure to present federal
7 habeas claims to state court in timely fashion resulted in
8 procedural default of those claims).

9 Therefore, I find that petitioner's due process claim in the
10 case at bar was never "fairly presented" to Oregon's highest court
11 during any of his PCR proceedings. Further, under Oregon law,
12 petitioner is now barred from filing any additional PCR
13 proceedings or PCR appeals and therefore cannot "fairly present"
14 any additional claims to Oregon's highest court in a context where
15 their merits will be considered. Petitioner has procedurally
16 defaulted his claim and therefore his habeas petition is
17 dismissed.

18 Even, however, if this court were to consider the underlying
19 merits of petitioner's claim, I find petitioner's claim lacks
20 merit because an Oregon State court has previously determined that
21 the procedure used in petitioner's case was required by Oregon
22 law. Specifically, "it is not the province of a federal habeas
23 court to reexamine state-court determination on state-law
24 questions. In conducting habeas review, a federal court is
25 limited to deciding whether a conviction violated the
26 Constitution, laws, or treaties of the United States." Estelle
27 v. McGuire, 502 U.S. 62, 67-68 (1991).

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1 Here, petitioner asserts that the Oregon courts lacked
2 jurisdiction over him to do anything about the criminal offenses
3 at issue in this case. Petitioner argues that the Oregon State
4 courts violated Oregon state law when it ruled that his case
5 should be sent to the juvenile court to determine whether he
6 should proceed in adult court or juvenile court on the offenses
7 at issue in this habeas proceeding. Petitioner further asserts
8 that Oregon courts violated his federal due process rights because
9 a state's failure to comply with its own laws violates the
10 Fourteenth Amendment's Due Process Clause.

11 Petitioner's claim turns on whether the trial court at
12 petitioner's underlying criminal proceedings properly interpreted
13 Oregon law as requiring that petitioner be remanded to juvenile
14 court to consider whether he should stand trial as an adult. I
15 am persuaded by a Fourth Circuit Court of Appeals decision holding
16 that whether a state court properly determined that it had
17 jurisdiction over offenses committed by a juvenile is a state law
18 question and not a question of federal law. See Wright v.
19 Angelone, 151 F.3d 151, 157-58 (4th Cir. 1998).

20 Here, the trial court that presided over petitioner's
21 criminal proceeding interpreted state law in finding that
22 petitioner was required to be remanded back to the juvenile court
23 so that court could determine whether he should proceed in adult
24 or juvenile court. Petitioner's criminal trial judge ruled that
25 the issue of what court petitioner should be in was "not a matter
26 of jurisdiction but one of procedure" and the judge directed that
27 the juvenile court department review the new charges for
28 determination under the statute. I find that this state law

1 interpretation is binding on this court. See also, Bains v.
2 Cambra, 204 F.3d 964, 972 (9th Cir.) ("federal courts [are] bound
3 by the state court's interpretation of state law"), cert. denied,
4 531 U.S. 1037 (2000) (internal citation omitted).

5 I find that petitioner's claim is procedurally defaulted.
6 Moreover, I find no showing of "cause and prejudice" for
7 petitioner's failure to present his claim to Oregon's highest
8 court, and no evidence that his convictions resulted in a
9 "fundamental miscarriage of justice" due to petitioner's "actual
10 innocence." Petitioner asserts that he is "actually innocent of
11 the sentence imposed on him because he was not eligible for that
12 sentence through the procedures employed." Notably, petitioner
13 does not argue that he did not commit the acts upon which his
14 convictions are based.

15 I disagree with the petitioner that either the Ninth Circuit
16 or this court have held that the "actual innocence" exception
17 applies to sentencing error claims. See Charles v. Baldwin, 1999
18 WL 694716 at 4-5 (D. Or. 1999) (court rejected petitioner's attempt
19 to excuse the default of a sentencing error claim under the
20 "actual innocence" exception because court found the "'actual
21 innocence' exception applies to innocence of an 'offense,' not
22 innocence of a sentence or a sentence enhancement."). Moreover,
23 I find no evidence of petitioner's "actual innocence." See
24 Wildman v. Johnson, 261 F.3d 832 (9th Cir. 2001) (court rejected
25 petitioner's attempt to excuse default of a sentencing claim under
26 the "miscarriage of justice" exception finding no showing of
27 "factual innocence," "since Wildman failed to challenge the facts
28 underlying his convictions, his claim of manifest injustice is

1 without merit.").

2 Therefore, I find no excuse for petitioner's default, and
3 deny relief on his claim for due process.

4 CONCLUSION

5 Petitioner's federal habeas petition is dismissed. This case
6 is dismissed and all pending motions are denied as moot.

7 Dated this 13 day of January 2006.

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11 /s/ Ann Aiken
12 Ann Aiken
13 United States District Judge
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